Malayan Testing Laboratory Sdn Bhd v Standard Chartered Bank Malaysia Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–666 OF 2003
MOHD AMIN FIRDAUS JC
26 OCTOBER 2009

Banking — Banker and customer — Banking transactions — Breach of customer's mandate — Payment on cheques fraudulently presented — Whether obvious discrepancies shown — Degree of reasonable care and skill expected of paying bank — Whether bank negligent in allowing overdraft despite absence of overdraft facility agreement — Whether contributory negligence by customer

The plaintiff company ('MTL') at all material times was and still is a customer of the defendant bank ('SCB'). MTL maintained a current account at the defendant bank situated in Penang. PW1, the managing director of MTL, and his wife were the authorised signatories of the current account maintained by MTL at SCB. One Rohani bt Kassim ('RK') was employed as the accounts clerk with Lambaran Emas Sdn Bhd ('LESB') of which PW1 is also the managing director of this company. RK was confirmed in employment in December 1996. LESB provided accounting and secretarial services to a group of companies, one of which was MTL. As an accounts clerk in LESB, RK handled the accounting work for the group of companies. RK was responsible for preparing cheques for payments on behalf of the group of companies and for banking payments received from customers into the various bank accounts of the companies. Further, RK also personally went to SCB to carry out the banking transactions of MTL. On 27 January 1998, PW1 was shocked to see the bank statement of MTL's current account. Further enquiry revealed that between the period of September 1996 and January 1998, RK had fraudulently and without the authority of the plaintiff altered or tampered with a total of 32 cheques belonging to her employer amounting to a sum of RM860,942.40. RK typed out her name as the payee and/or altered the amounts and names of payees stated in the cheques involved. In consequence of her fraudulent actions, SCB made the respective payments from the 32 cheques amounting to RM860,942.40 into her personal bank accounts and debited the current account of the plaintiff with the corresponding amounts. Further, between November 1997 and February 1998, SCB had negligently allowed RK to withdraw more than RM45,000 from MTL's current account despite the very fact that MTL did not have any agreement for overdraft facility with the defendant bank SCB. Subsequently, RK was investigated by the police in connection with this case but she had since absconded. PW1 stated that as Managing Director of MTL he had

never signed blank cheques for RK. Further, he did not authorise the 32 cheques to be drawn in favour of RK with the amounts respectively stated therein. The issues before the court were as follows: (a) whether the defendant had knowingly or negligently facilitated RK to operate the plaintiff's current account fraudulently by paying the sum of RM860,942.40 over a period of time from the 32 cheques into her personal bank accounts without the authority of MTL; and (b) whether the defendant had knowingly or negligently without the authority of MTL allowed RK to overdraw its current account to the tune of RM58,900 despite the absence of any overdraft facility agreement between SCB and MTL.

Held, allowing the plaintiff's claim with costs:

(1) SCB had breached the customer's mandate by making payments without the customer's authority. The primary duty of care of the paying banker was to make payment in accordance with the mandate of the customer. When SCB made payments on behalf of MTL, it was under a duty to exercise care in carrying out the instructions of the customer. SCB was negligent by paying to RK who had no right to receive the payments (see paras 77 & 81).

(2) SCB as an established banker should have been aware that its primary duty as a paying banker when making payments on behalf of the plaintiff company was to verify that RK was the person entitled to the payments. If done so, in all probability it would have found out about the fraudulent actions committed by RK. The fact that at that time there was no internal banking procedural guideline to oblige SCB to make such enquiries was irrelevant (see paras 85 & 92).

(3) Ironically, none of the defendant's staff suspected something amiss about the 32 cheques especially when some of the alterations were so stark. It did not even require any special training, let alone forensic science, to detect the wrongdoing. For example, in regard to the cheque for the sum of RM30,120, common sense will tell one that the speed in which RK wanted to clear this particular cheque payable to her own self for such a hefty sum smacks of dishonesty. SCB had clearly not exercised that degree of reasonable care and skill towards MTL, its customer (see paras 93–94).

(4) There was no contributory negligence on the part of the plaintiff company. Although there was weakness in the internal management of MTL, they however do not detract from the primary duty of care of the paying banker when making payments to ascertain that the correct person is being paid (see paras 102–103).

(5) SCB had not exercised the standard of reasonable care and skill expected from an established bank like itself especially when

considering that some of the material alterations done were so clear even to bare eyes. SCB had negligently or even knowingly facilitated RK to misappropriate the sum of RM860,942.40 from the current account of MTL and to overdraw its current account to the tune of RM58,900 despite the absence of any overdraft facility agreement (see paras 109–110).

[Bahasa Malaysia summary

Syarikat plaintif ('MTL') pada semua masa material merupakan dan masih menjadi pelanggan bank defendan ('SCB'). MTL mengekalkan akaun semasa di bank defendan yang terletak di Pulau Pinang. PW1, pengarah urusan MTL dan isterinya adalah penandatangan yang diberi kuasa untuk akaun semasa yang dikekalkan oleh MTL di SCB. Seorang yang bernama Rohani bt Kassim ('RK') dilantik sebagai kerani akaun dengan Lambaran Emas Sdn Bhd ('LESB') yang mana PW1 adalah juga pengarah urusan syarikat. RK disahkan dalam jawatannya pada Disember 1996. LESB memperuntukkan perkhidmatan perakaunan dan setiausaha kepada kumpulan syarikat, salah satu daripadanya MTL. Sebagai kerani perakaunan di LESB, RK mengendalikan kerja-kerja perakaunan untuk kumpulan syarikat tersebut. RK bertanggungjawab menyediakan cek-cek untuk pembayaran bagi pihak kumpulan syarikat dan untuk memasukkan ke dalam bank, bayaran yang diterima daripada pelanggan daripada beberapa akaun bank syarikat-syarikat. Selanjutnya, RK juga secara peribadi pergi ke SCB untuk melaksanakan transaksi perbankan MTL. Pada 27 Januari 1998, PW1 terkejut apabila melihat penyata bank akaun semasa MTL. Siasatan lanjut mendedahkan bahawa di antara tempoh September 1996 dan Januari 1998, RK telah secara fraud dan tanpa kuasa plaintif meminda atau mengubah 32 keping cek kepunyaan majikannya berjumlah sebanyak RM860,942.40. RK menaipkan namanya sebagai penerima dan/atau mengubah jumlah dan nama penerima yang dinyatakan di dalam cek-cek tersebut. Disebabkan oleh tindakan fraudnya, SCB membuat bayaran-bayaran tersebut daripada 32 keping cek berjumlah RM860,942.40 ke dalam akaun peribadinya dan mendebitkan akaun semasa plaintif dengan jumlah yang sama. Selanjutnya, di antara bulan November 1997 dan Februari 1998, SCB telah secara cuai membenarkan RK mengeluarkan lebih daripada RM45,000 daripada akaun semasa MTL meskipun fakta adalah bahawa MTL tidak mempunyai apa-apa perjanjian kemudahan overdraf dengan bank defendan SCB. Kemudian, RK disiasat oleh polis berkaitan dengan kes ini tetapi dia telah melarikan diri. PW1 menyatakan bahawa sebagai Pengarah Urusan MTL dia tidak pernah menandatangani cek kosong untuk RK. Selanjutnya, dia tidak pernah memberikan kuasa untuk 32 cek ditunaikan bagi pihak RK dengan jumlah seperti yang tertera di dalamnya. Isu-isu di hadapan mahkamah adalah seperti berikut: (a) sama ada defendan dengan pengetahuan atau secara cuai membantu RK untuk mengendalikan akaun semasa plaintif secara fraud dengan membayar jumlah RM860,942.40 bagi suatu tempoh daripada 32

A cek tersebut ke dalam akaun peribadi bank tanpa kuasa MTL; dan (b) sama ada defendan dengan pengetahuan atau secara cuai tanpa kuasa MTL membenarkan RK mengeluarkan dari akaun semasa sejumlah RM58,900 walaupun tanpa apa-apa perjanjian kemudahan overdraf di antara SCB dan MTL.

B

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) SCB telah melanggar mandat pelanggan dengan membuat bayaran tanpa kuasa pelanggan. Kewajipan berjaga-jaga utama bank pembayar C adalah untuk membuat bayaran menurut mandat pelanggan. Apabila SCB membuat bayaran bagi pihak MTL, ia mempunyai kewajipan untuk berhati-hati dalam melaksanakan arahan pelanggan. SCB telah cuai kerana membayar RK yang tidak mempunyai hak untuk menerima bayaran (lihat perenggan 77 & 81).

D

(2) SCB sebagai bank yang telah bertapak sepatutnya mengetahui bahawa kewajipan utamanya sebagai bank pembayar apabila membuat bayaran bagi pihak syarikat plaintif perlu mengesahkan bahawa RK adalah orang yang berhak bagi bayaran-bayaran tersebut. Jika dibuat demikian, besar kemungkinan ia akan mendapat tahu mengenai tindakan fraud E yang dilakukan oleh RK. Fakta bahawa pada masa tersebut tidak ada garis panduan prosedur perbankan untuk mewajibkan SCB membuat siasatan sedemikian adalah tidak relevan (lihat perenggan 85 & 92).

(3) Secara ironik, tidak seorang pun daripada pekerja defendan mengesyaki F sesuatu yang tidak kena tentang 32 cek tersebut khususnya apabila beberapa perubahan padanya sangat jelas. Malahan ia tidak memerlukan apa-apa latihan istimewa, dan juga sains forensik, untuk mengesan salah laku tersebut. Sebagai contoh, berkaitan dengan cek bagi jumlah RM30,120, akal budi boleh menyatakan bahawa RK yang G mahu bayaran dipercepatkan bagi cek yang khusus ini dibayar kepada dirinya sendiri untuk jumlah yang begitu besar, menunjukkan unsur ketidakjujuran. SCB jelas tidak melaksanakan takat berhati-hati dan kemahiran yang munasabah terhadap MTL, pelanggannya (lihat perenggan 93–94).

H

(4) Tidak ada kecuaian bersama oleh pihak syarikat plaintif. Walaupun terdapat kelemahan dalam pengurusan dalaman MTL, ia walau bagaimanapun tidak mengurangkan kewajipan berhati-hati utama bank pembayar apabila membuat bayaran untuk memastikan bahawa ia I membayar kepada pihak yang betul (lihat perenggan 102–103).

(5) SCB tidak melaksanakan standard berhati-hati dan kemahiran yang munasabah yang diharapkan daripada sebuah bank yang telah bertapak sepertinya apabila mempertimbangkan bahawa beberapa perubahan yang material yang dibuat adalah amat jelas walaupun pada mata kasar.

SCB telah secara cuai atau dengan pengetahuan membantu RK melesapkan jumlah RM860,942.40 daripada akaun semasa MTL dan mengeluarkan secara berlebihan daripada akaun semasa sehingga jumlah RM58,900 meskipun tiada perjanjian kemudahan overdraf (lihat perenggan 109–110).]

Notes

For cases on banker and customer in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1799–1875.

Cases referred to

Bank of America National Trust and Savings Association v Herman Iskandar & Anor [1998] 2 SLR 265, CA (refd)
Bank of Montreal v Dominion Gresham Guarantee and Casualty Co Ltd [1930] AC 659, PC (refd)
Chatterton v London and County Bank (1890) Journal XI, CA (refd)
Commissioners of Taxation v English, Scottish and Australian Bank Ltd [1920] AC 683, PC (folld)
Dr Lo Sook Ling Adela v Au Mei Yin Christina & Anor [2002] 1 SLR 408, CA (refd)
Fowler v Lanning [1959] 1 QB 426, QBD (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)
Kepitigalla Rubber Estates Ltd, The v The National Bank of India Ltd [1909] 2 KB 1010, KBD (refd)
Saeng-Un Udom v PP [2001] 3 SLR 1, CA (refd)
Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors [1986] AC 80, PC (refd)
Ung Eng Huat & Anor v Arab Malaysian Bank Bhd [2003] 6 MLJ 1, HC (refd)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 24, 60, 64(1), (2), 82(1), 95
Limitation Act 1953 ss 6, 29(b), 32

V Sithambaram (Sitham & Associates) for the plaintiff/appellant.
Jeyasingam Balasingam (Ghazi & Lim) for the defendant/respondent.

Mohd Amin Firdaus JC:

FACTS OF THE CASE

[1] The salient facts are that the plaintiff company, Malayan Testing Laboratory Sdn Bhd ('MTL') at all material times was and still is a customer

of the defendant bank which is Standard Chartered Bank Malaysia Bhd ('SCB'). MTL is an analytical and consulting testing laboratory.

[2] Sometime between the period of September 1996 and January 1998, MTL maintained a current account No 407–1–1280287–5 at the defendant bank SCB branch situated at No 2 Lebuh Pantai, Penang.

[3] Ong Tat Lien ('PW1') the managing director of the plaintiff company MTL and his wife Goh Poh Lee are the authorised signatories of the current account maintained by MTL at SCB. Either one of the signatories is sufficient to operate the said current account. PW1 said that usually he is the signatory to all transactions.

[4] On 6 September 1996, one Rohani bt Kassim ('RK') commenced employment as a probationary accounts clerk with a company known as Lambaran Emas Sdn Bhd ('LESB') of which PW1 is also the managing director of this company. In December 1996 she was confirmed as an accounts clerk. LESB provides accounting and secretarial services to a group of companies one of which is MTL.

[5] As an accounts clerk in LESB, RK handled the accounting work for the group of companies to which it provides its accounting and secretarial services. She was also responsible for preparing cheques for payments on behalf of the group of companies and for banking payments received from customers into the various bank accounts of the companies. She also personally went to SCB to carry out the banking transactions of MTL.

[6] RK also kept the cheque books of MTL in respect of the current account maintained at SCB. On 27 January 1998, PW1 went to SCB to do some banking matters. While there, he requested from one Danny Yeap Cheng Aun, the sales and service officer for priority banking, to see the bank statement of MTL's current account. Incidentally this Danny Yeap (SD1) today is the branch manager of the same defendant bank SCB.

[7] When shown the computerised bank statement for January 1998, he was shocked to discover that the current account of the plaintiff company MTL had been overdrawn by more than RM70,000. Later PW1 found out that this thing happened continuously right up until 16 February 1998 resulting in the plaintiff company MTL's current account being overdrawn by more than RM45,000.

[8] PW1 said that he was shocked because MTL at the material time had no overdraft facility with SCB. Further enquiry revealed that between the period of September 1996 and January 1998, RK had fraudulently and

without the authority of the plaintiff company had altered or tampered with a total of 32 cheques belonging to her employer amounting to a sum of RM860,942.40. She typed out her name as the payee or/and altered the amounts and names of payees stated in the cheques involved.

[9] PW1 said that as managing director of MTL, he had never signed blank cheques for RK. Between the period of September 1996 and January 1998, he did not authorise the 32 cheques found in the agreed bundle of documents 'A' from pp 45–76 to be drawn in favour of RK with the amounts respectively stated therein.

[10] In consequence of her fraudulent actions, SCB made the respective payments from the 32 cheques amounting to RM860,942.40 into her personal bank accounts and debited the current account of the plaintiff company with the corresponding amounts.

[11] Subsequently RK was investigated by the police in connection with this case according to ASP Shahanim bt Shaari (PW2) but she had absconded now.

ISSUES

[12] Learned counsel for the plaintiff company listed down seven issues to be tried: (in verbatim)

(a) Whether the total of 32 cheques belonging to the plaintiff amounting to RM860,942.40, presented by Rohani bt Kassim to the defendant was fraudulently and without the plaintiff's authority altered/tampered by the said Rohani bt Kassim, by typing her name as the payee of the cheques and/or by altering/tampering the amounts stated in the said cheques;

(b) Whether the defendant had failed to exercise reasonable diligence and/or observe reasonable skill and care in paying the sum of RM860,942.40 on a total of 32 cheques presented to it by one Rohani bt Kassim into the personal accounts of the said Rohani bt Kassim, when it knew or ought to have known that the said cheques had been altered/tampered and/or that the plaintiff had not authorised of the same to Rohani bt Kassim;

(c) Whether the defendant had acted wrongfully and without the plaintiff's authority in paying the amounts of RM860,924.40 into the personal accounts of Rohani bt Kassim and thereby wrongfully debiting the plaintiff's current account with the amount thereof;

(d) Whether the defendant was in breach of its duty of care as bankers in paying the amount of RM860,924.40 into the personal accounts of Rohani bt Kassim and wrongfully debiting the plaintiff's current account with the amount thereof, without making any enquiries with the plaintiff;

(e) Whether the defendant was negligent and/or in breach of contract in continuing to pay the total sum of RM860,942,40 into the personal accounts of Rohani bt Kassim despite having reasonable grounds as bankers to suspect and/or believe that the said Rohani bt Kassim was operating the plaintiff's current accounts fraudulently;

(f) Whether the defendant had acted negligently and without the plaintiff's authority in permitting the plaintiff's current account to be overdrawn for a sum of RM58,900 by the said Rohani bt Kassim, despite the plaintiff's not having any agreement for overdraft facilities with the defendant;

(g) Whether the defendant had breached an implied term of contract between the defendant as bankers and the plaintiff as its customer that the defendant would observe reasonable skill and care in and about executing the plaintiff's orders including on cheques drawn on the plaintiff's current account, by paying the sum of RM860,942 into the personal accounts of Rohani bt Kassim and permitting the plaintiff's current accounts to be overdrawn by a sum of RM58,900 without the plaintiff's authority.

[13] With all due respect to learned counsel, all the issues stated overlapped.

[14] The court views that the following issue listed below should be a more encompassing issue.

[15] Whether the defendant bank SCB had knowingly or negligently facilitated Rohani bt Kassim to operate the plaintiff company MTL's current account fraudulently by paying the sum of RM860,942.40 over a period of time from the 32 cheques into her personal bank accounts without the authority of MTL and again whether it had knowingly or negligently without the authority of the MTL allowed her to overdraw its current account to the tune of RM58,900 despite the absence of any overdraft facility agreement between SCB and MTL?

THE PARTIES' CONTENTIONS

The plaintiff company

[16] Based on the written submission and the evidence adduced by SCB

during the trial, learned counsel for the plaintiff company MTL marshalled his arguments that it was an implied term of the contract between SCB and MTL, the banker and customer, that the former would exercise reasonable skill and care in performing banking duties for MTL especially as regards the drawing and payment of cheques on its current account.

[17] SCB as an established banker had reasonable grounds to have known or ought to have known that the 32 cheques had been altered or tampered with by the said Rohani bt Kassim (RK) and that the plaintiff company MTL had not approved the payment totalling RM860,942.40 from all these cheques paid over a period of time into her personal bank accounts spanning from September 1996 until January 1998. It was contended that SCB was negligent.

[18] Between November 1997 and February 1998, SCB had negligently allowed RK to withdraw more than RM45,000 from MTL's current account despite the very fact that MTL did not have any agreement for overdraft facility with the defendant bank SCB (BOD 'D' pp 167–170). No resolution was passed by MTL to apply for an overdraft facility from SCB.

[19] PW1 had testified in examination-in-chief that he had never applied at all to the defendant bank SCB for overdraft facility and neither did the latter have ever written to him offering such facility. In fact PW1 had lodged five police reports in 1998 against the said RK for misappropriating all the money.

[20] There was a gross dereliction of duty on the part of SCB to cause or permit the current account of MTL to be overdrawn despite the absence of an overdraft facility agreement between both parties. The defendant bank SCB owed a duty of care in not permitting the overdraft payments.

[21] SCB knew RK to be an employee of MTL and regularly dealt with its current account and when she frequently presented altered cheques for substantial amounts of money made payable to herself, SCB should have alerted PW1 to make enquiries before honouring the cheques.

[22] When PW1 signed the 32 cheques, they were not for the amounts stated in the respective cheques and neither were they made payable to RK. He said that he had never signed any empty cheques.

[23] The 32 cheques were presented for payments on an average of two to three cheques a month over a period of 16 months from September 1996 to January 1998.

A **[24]** Some of the discrepancies as seen on the cheques are obvious. ASP Shahanim bt Shaari (PW2) the police investigating officer testified that with bare eyes one can see that some of the figures, commas and full stops typed did not align.

B **[25]** Cheque No 500492 issued on 4 February 1997 (disagreed bundle of documents on p 171). The wordings on the cheque stated 'Forty Seven Thousand and Eighty Only' while the figures denoted RM47,000.80. The words on the cheque clearly do not match with the amount stated.

C **[26]** The evidence of the government document examiner (PW3) confirms that the 32 cheques had been altered. As SCB did not call its own expert to challenge the evidence of PW3, the court must act on his evidence unless the court finds that it is not convincing: *Dr Lo Sook Ling Adela v Au Mei Yin Christina & Anor* [2002] 1 SLR 408 and *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1.

D

[27] The investigation report done by Ahmad Abdullah & Goh, a firm of public accountants dated 9 June 1998, (disagreed bundle of documents from E pp 165–173) shows the obvious negligence of SCB.

[28] He contended that had SCB exercised the requisite skill and care required of them as professional bankers, it would have been able to detect the apparent signs of alterations on the cheques and stopped the payments.

F

[29] SCB did not plead that the alterations are not apparent in its statement of defence dated 10 February 2004. Thus it now cannot rely on the provision of s 64(1) of the Bills of Exchange Act 1949.

G **[30]** The defendant bank also did not plead that the said resolution of the plaintiff company empowered SCB to allow the current account of MTL to be withdrawn or that the overdraft facility was given on account of its good track record. It is trite law that a party is bound by its pleadings.

H **[31]** All the 32 cheques bore the signature of PW1 and except for cheques No 500536; 500666 and 500641, SCB did not enquire from PW1 before honouring them in favour of RK.

I **[32]** PW1 as managing director of MTL wrote four times to SCB seeking an explanation as to how its current account could be withdrawn by more than RM70,000 when there was no overdraft facility agreement. The four letters were dated 30 November 1999, 29 March 2000, 27 July 2000 and 8 November 2002 respectively. The defendant bank replied on two occasions in

its letters dated 15 December 1999 and 5 April 2000 stating that it would revert to him after the completion of its investigation. Thereafter, PW1 did not receive any more replies from SCB.

[33] The evidence of DW1 is hearsay as at the material time of all the transactions being carried out, he was not attached to the clearance and verification department for cheques but was a sales and services officer taking care of priority banking.

[34] It was argued that there was contributory negligence on the part of MTL is misconceived and untenable.

[35] The plaintiff company's learned counsel also contended that there was no limitation by virtue of s 29(b) of the Limitation Act 1953 because the alterations were only discovered by PW1 on 27 January 1998.

[36] The doctrine of laches is also not applicable.

[37] The failure by SCB to reply means that the defendant bank was clearly negligent.

[38] Therefore the claim of the plaintiff company should be allowed.

The defendant bank

[39] The defendant bank's learned counsel argued that the burden to prove negligence is borne by the plaintiff company. The gist of his argument is that if PW1 or his accountant had studied the monthly bank account statements, the plaintiff company would have been able to discover the misappropriation of all the money. SCB issues monthly bank statements to its customers.

[40] The accountant for the plaintiff company did not check MTL's bank statements especially at the end of September 1996 in view of the fact that RK was relatively speaking a new employee. If done so, MTL would have discovered that RK had begun to alter the cheques.

[41] Rohani Kassim had begun to tamper with the cheques only five days after she joined the plaintiff company on 6 September 1996.

[42] RK was solely responsible for the alteration or tampering with the cheques meaning not the staff of the defendant bank SCB. All the police reports on the alleged misappropriation of all the money were made against RK and not against SCB by PW1.

[43] Before honouring the cheques (P5; 1–32) SCB had verified the contents and the signatures on the cheques by comparing them with the specimen signature of PW1. The alterations on the cheques were not obvious to the naked eyes and were not detected by SCB. If it had detected any alteration to any particular cheque, it would not have been cleared. Although they were trained, the staff members involved were not document experts.

[44] The staff members 'only have a cursory look at the cheques and do not look at the cheques under bright light or microscope as they clear 2000 cheques per day'.

[45] Learned counsel cited the case of *Ung Eng Huat & Anor v Arab Malaysian Bank Bhd* [2003] 6 MLJ 1 which held 'that apparent material alteration in the bill means it is discovered by simple inspection due to its obviousness. The holder is only aided by mere sight without resorting to other gadgets or means to confirm the alteration'.

[46] It was argued that even PW3 himself being a document expert could not detect all the alleged alterations.

[47] He also cited s 64(1) of the Bills of Exchange Act 1949 where the court held:

> ... under the proviso to s 64, an exception has been legislated whereby the drawee bank may still have to pay up if the ingredients of the proviso are satisfied. In a gist, despite the material alteration, payment may still be enforced if the alteration is not apparent to the holder of the bill.

[48] Learned counsel also referred to ss 60 and 82(1) of the said Act which basically highlight that where a banker in good faith and in the ordinary course of business pays a cheque drawn on him, the banker is protected by s 95 of the same Act.

[49] 'Good faith' is defined in s 95:

> A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

[50] Learned counsel contended that SCB 'in this case being the drawee bank, finding no apparent alterations, rightfully debited the plaintiff's account with the said sum and was not negligent in doing so'.

[51] He submitted thus SCB had acted as a reasonable prudent banker in honouring all the cheques.

[52] Although at that material time it was not the practice of SCB to enquire from customers regarding doubts concerning any cheques before honouring them yet SCB did enquire from MTL to verify such cheques by calling one Miss Aini three times.

[53] DW1 said that SCB will usually enquire from the signatory to the cheque but in this case presumably PW1 was not in the office and hence the enquiry was channelled to that Miss Aini. Besides, MTL being a long time customer of SCB, the defendant bank had allowed the cheques to be honoured.

[54] The resolution of the board of directors held on 13 October 1986 empowered SCB to honour cheques, bills of exchange and promissory notes made on behalf of MTL by PW1 even if its account is in credit or not. As the directors had signed the resolution, MTL is now bound by its terms.

[55] The evidence of Wong Kong Yong (PW3) the document examiner who is an expert is not reliable and conclusive. It was contended that the non-alignment of the words or figures typed were not actually alterations but the way they were typed by the typist. PW3 had testified that the alignment and whether the print is in darker or lighter shade depend on the individual typist.

[56] Learned counsel also submitted on contributory negligence on the part of MTL. MTL did not have an efficient accounting department and that its accountant and PW1 did not study the monthly bank statements. If they had done, so they would have discovered the alleged misappropriation of the money belonging to the plaintiff company.

[57] MTL had also allowed RK to bring her own typewriter to the office when it was not necessary because the plaintiff company already had one. Both PW1 and the accountant also did not supervise the work of RK properly when she was on probation and if they had done so, they would have found out about her wrongdoing.

[58] Ernst & Young the plaintiff company's accountants also did not detect the misappropriation of the money belonging to the company. What is more, SCB was in a disadvantageous position without access to all the material documents to discover the misdeeds of RK unlike the accountant firm.

[59] He further contended that statutory limitation has now set in and cited s 6 of the Limitation Act 1953 to bolster his contention. The basis for his argument is that the cause of action accrued when the defendant allegedly

honoured the 32 cheques in question in the various months for the respective years of 1996 and 1997 and thus was time barred by 2002 and 2003.

[60] Alternatively, if the claim is not time barred, the whole claim is caught by s 32 of the said Limitation Act by the doctrine of laches.

[61] Although PW1 found out that the plaintiff company's account was overdrawn on 27 January 1998 yet this suit against SCB was only initiated five years and 11 months later.

[62] It was further argued that the evidence of Lim Su Lyn (PW4) the chartered certified accountant of the firm Messrs Ahmad Abdullah & Goh in her answers to question 9 in her witness statement (PWS4; 9(iii)(c)(d)) regarding a sum of RM71,421.77 from LESB's fixed deposit account mistakenly transferred by SCB to the current account of MTL and in another case where a transfer slip to uplift the sum of RM54,113.41 to the current account of MTL stated 'Malayan Testing Sdn Bhd' and not 'Malayan Testing Laboratory Sdn Bhd,' are inadmissible as the material facts were not pleaded. The cases of *Fowler v Lanning* [1959] 1 QB 426 and *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 were cited to support his contention.

[63] Thus the plaintiff company MTL has not proven its case against the defendant bank.

FINDINGS

[64] After analysing and evaluating the overall evidence of the case and considering the arguments of both parties, the court finds that the plaintiff company MTL has proven its case against the defendant bank SCB.

[65] First and foremost the court views that it is relevant to know the general meaning of negligence in English banking law in conjunction with the claim of the plaintiff company MTL.

[66] Lord Dunedin in the Privy Council case of *Commissioners of Taxation v English, Scottish and Australian Bank Ltd* [1920] AC 683 defines the general meaning of negligence in English banking law:

> The test of negligence is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make inquiry.

FORGERY

[67] In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors* [1986] AC 80, the Privy Council held in that Hong Kong case that a customer does not owe a duty to his banker to prevent the forgery of his cheques.

[68] The term 'forgery' is not defined in the Bills of Exchange Act 1949 (Act 204) but the term appears in s 24 and s 60.

[69] It appears that s 64(1) and (2) of the Bills of Exchange Act 1949 (Act 204) refers to material alterations also as forgery.

[70] In this present case, the plaintiff company MTL contended that there were material alterations to the 32 cheques in question.

IS THE CUSTOMER DUTY BOUND TO CHECK HIS BANK STATEMENTS?

[71] The defendant bank SCB's learned counsel argued vehemently that if PW1 or MTL's accountant had checked the monthly bank statements sent to the plaintiff company, it would have discovered the material alterations perpetrated by RK as early as September 1996 when she first came on board the plaintiff company.

[72] The court views that his contention is baseless in the light of the general accepted view that no duty is cast upon the customer to examine his passbook and bank statements.

[73] In *Chatterton v London and County Bank* (1890) Journal XI, this Court of Appeal case which was reported in the *Miller* newspaper on 3 November 1890 where Lord Esher MR expressed the view that customers were not bound to check the entries in their passbooks or statements. Please see *The Law and Practice of Banking* Vol 1 by J Milnes Holden (3rd Ed), p 78.

[74] Lord Esher's observation that customers are under no duty to check their bank statements was approved and applied by Bray J in *The Kepitigalla Rubber Estates Ltd v The National Bank of India Ltd* [1909] 2 KB 1010.

[75] In *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, the Supreme Court of Malaysia held that a customer does not owe a duty to his banker to check his bank statements.

[76] It is also pertinent to draw the attention to *Tai Hing Cotton Mill Ltd* case which the Privy Council held that a customer does not owe a duty to his banker to prevent the forgery of his cheques.

PAYING BANKER'S DUTY OF CARE IN CARRYING OUT CUSTOMER'S MANDATE

[77] The court finds that the plaintiff bank SCB had breached the customer MTL's mandate by making payments without the customer's authority. The primary duty of care of the paying banker is to make payment in accordance with the mandate of the customer.

[78] As observed by the learned author Poh Chu Chai in the *Law of Banker and Customer* (4th Ed) on p 86:

> Inherent in the mandate of a customer is the duty of a banker to carry out the mandate with reasonable care.

[79] To further quote the learned author:

> When a bank makes a payment on behalf of a customer, it is under a duty to exercise care in carrying out the instructions of the customer. The bank has to ensure that the payment is made with the authority of the customer and the person who is being paid is entitled to receive the payment.

[80] He cited *Bank of Montreal v Dominion Gresham Guarantee and Casualty Co Ltd* [1930] AC 659 to support the proposition. In that case it was held that the primary duty of care of a paying banker when making payments on behalf of a customer was to ascertain that the right person received the payment.

[81] When SCB made payments on behalf of MTL, it was under a duty to exercise care in carrying out the instructions of the customer. SCB was negligent by paying to RK who had no right to receive the payments.

[82] In the Singapore Court of Appeal case in *Bank of America National Trust and Savings Association v Herman Iskandar & Anor* [1998] 2 SLR 265, it was held that a banker is under a duty to make reasonable attempts to contact a customer to obtain proper instructions from the customer.

FAILURE OF SCB TO MAKE REASONABLE ENQUIRIES

[83] The court finds that the failure of SCB to make reasonable attempts to contact MTL, a long time customer, had negligently facilitated RK in

siphoning the money from the current account of MTL. Please see the said case of *Bank of America National Trust and Savings Association*.

[84] It is noteworthy to say that the frequency of the fraudulent transactions and in some cases involving huge amounts all payable to the same person ought to have put the defendant bank on alert that something was not right and goaded it on to contact PW1.

[85] SCB as a reasonable prudent established banker should have been aware that its primary duty as a paying banker when making payments on behalf of the plaintiff company was to verify that RK was the person entitled to the payments. If done so, in all probability it would have found out about the fraudulent actions committed by RK. Please see the cited case of *Bank of Montreal*.

[86] SD1 said that SCB had contacted one Miss Aini a few times on the telephone to clarify the position of certain cheques which with hindsight he now thinks is actually RK who was the culprit.

[87] The court views that it was not reasonable for SCB to get clarification from a low level office staff having no say at all in the running of the money of MTL. When it failed to contact PW1, at the least it ought to have contacted the accountant of the plaintiff company to get the proper instructions.

[88] Its failure to seriously contact PW1 had been detrimental to the interests of MTL. For example, cheque No 500426 dated 9 December 1996 for the sum of RM30,120 payable to RK herself (agreed bundle of documents; p 55) was a marked cheque. This means when the cheque was presented to the paying bank SCB by the collecting bank Kwong Yik Bank at that time, the former was requested to speed up the clearing.

[89] For such a large amount yet SCB did not do any verification for example by telephoning PW1 or his accountant bearing in mind that MTL has been its long standing customer. After all, what is so troublesome by merely making a few telephone calls? The advent of the hand phone has made communication easier at any time of the day from anywhere.

[90] The very nature of this cheque ought to have aroused the suspicion of SCB.

[91] Again cheque No 500536 for the sum of RM32,680 dated 8 April 1997 payable to RK was purportedly for salary clearance. How could a payment made to an individual be for salary clearance? Again it did not create doubts in the mind of the banker to make enquiry from MTL.

[92] The fact that at that time there was no internal banking procedural guideline to oblige SCB to make such enquiries is irrelevant.

FAILURE TO DETECT MATERIALLY ALTERED CHEQUES

[93] What is of significance is the evidence of Danny Yeap Cheng Aun ('SD1') telling that a small number of its staff had undergone basic training to detect forgery, alteration and so forth in cheques, yet ironically none of them suspected something amiss about the 32 cheques especially when some of the alterations were so stark. In fact SD1 testified that at that material time there were about eight or ten such trained staff to verify or detect such cheques before they were cleared. It was not a small number yet not even one of them managed to find out the material alterations.

[94] For some cases it did not even require any special training, let alone forensic science, to detect the wrongdoing. For example in regard to the said cheque No 500426, common sense will tell one that the speed in which RK wanted to clear this particular cheque payable to her own self for such a hefty sum smacks of dishonesty. SCB had clearly not exercised that degree of reasonable care and skill towards MTL, its customer.

MATERIAL ALTERATIONS

[95] Some of the material alterations to the 32 cheques involved the fraudulent raising of the sums payable. PW1 said that one cheque No 500767 dated 19 January 1998 for the sum of RM900 payable to the said Rohani Kassim was fraudulently raised to RM58,900 by subsequently adding the figures 58 (agreed bundle of documents, p 78A).

[96] PW2, the police investigating officer testified to other fraudulent acts of RK like:

> Secara kasar, contohnya seperti nombor ada perubahan sebahagian, taip-menaip ada atas dan bawah. Perubahan juga ada pada tanda titik dan koma (referring to the 32 cheques in general).

[97] Some of the alterations are so apparent like the said cheque No 500767 where the name 'Rohani Kassim' typed out is ascending and out of alignment whereas the words 'Fifty eight thousand and nine hundred only' are neatly aligned (agreed bundle of documents, p 76). Cheque No 500536 dated 8 April 1997 is another example (agreed bundle of documents, p 45). A B

[98] Cheque No 500492 is also another example as referred to by MTL's learned counsel. The words Ringgit Malaysia stated 'Forty seven thousand and eighty only' whereas the corresponding figures stated 'RM47,000.80'.

[99] The said cheque No 500426 is another example in that while the wordings were all typed out in alignment horizontally including the date and the identity card number in figures; the figures '30,120.00' were clearly typed well below 'RM' in the column. C

[100] Despite the obvious discrepancies, all the cheques were cleared by SCB. D

EVIDENCE OF PW4

[101] The court agrees with the contention of the defendant bank's learned counsel that the said evidence of PW4 in connection with LESB and its sum of RM71,421.77 being wrongfully uplifted and credited into the current account of MTL on 22 January 1997 and the transfer slip stating the incorrect name of MTL to be inadmissible because the relevant material facts were not pleaded. E F

CONTRIBUTORY NEGLIGENCE

[102] The court finds no contributory negligence on the part of the plaintiff company in what learned counsel for the defendant basically argued that there was inefficiency in the accounts department of MTL because there was no monitoring of RK's work and MTL had allowed RK to bring her own typewriter into the office. If MTL had checked the work of RK and its cheque books, it would have discovered her misdeeds. G H

[103] All these things only reflected the weakness in the internal management on the part of MTL and they however do not detract from the primary duty of care of the paying banker when making payments to ascertain that the correct person is being paid. I

[104] Last but not least the principle of law stated in the case of *Tai Hing Cotton Mill Ltd* is relevant to this aspect of the defendant bank's contention.

LIMITATION ACT 1953

[105] The court finds that limitation does not apply by virtue of s 6 of the said Act as the cause of action only accrued on 27 January 1998 when PW1 first found out about the misappropriation of MTL's funds. Prior to this date he had no inkling of what was going on.

[106] By the same token, the doctrine of laches does not apply to the claim of MTL.

COMPANY'S RESOLUTION

[107] The court views that the said resolution of the board of directors of MTL decided on 13 October 1986 did not expressly provide for its current account to be overdrawn in the absence of an agreement for such overdraft facility.

THE PLAINTIFF COMPANY MTL'S CASE IS PROVEN

[108] Applying Lord Dunedin's test on general negligence in banking in the said case of *Commissioners of Taxation*, all the transactions in this instant case were so 'out of the ordinary course' in regard to the facts and its surrounding circumstances that they ought to have raised doubts in the mind of the banker and caused SCB to make an in depth enquiry.

[109] The court finds that SCB had not exercised the standard of reasonable care and skill expected from an established bank like itself especially when considering that some of the material alterations done were so clear even to the bare eyes.

[110] The court finds that SCB had negligently or even knowingly facilitated Rohani bt Kassim to misappropriate the sum of RM860,942.40 from the current account of MTL and to overdraw its current account to the tune of RM58,900 despite the absence of any overdraft facility agreement. For the aforesaid reasons, the court now allows the claim of the plaintiff company MTL as prayed for in para 12(i), (ii), (iii) and (iv) in the statement of case.

[111] The court orders the defendant bank to pay the plaintiff company the sum of RM860,942.40 together with interest at the rate of 8%pa from

the date of issue of the writ ie 3 December 2003 until the date of this judgment and further interest at 8%pa from the date of judgment until realisation and costs.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed